

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV -1 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

YVETTE JEANINE TELL,

Petitioner,

v.

HON. JANNA L. VANDERPOOL, Judge of
the Superior Court of the State of Arizona, in
and for the County of Pinal,

Respondent,

and

THE STATE OF ARIZONA, by and through
the Pinal County Attorney,

Real Party in Interest.

2 CA-SA 2010-0065
DEPARTMENT B

DECISION ORDER

SPECIAL ACTION PROCEEDING

Pinal County Cause Nos. CR201001812 and CR201001813

JURISDICTION ACCEPTED; RELIEF GRANTED

Mary Wisdom, Pinal County Public Defender
By Lisa M. Surhio

Florence
Attorneys for Petitioner

K E L L Y, Judge.

¶1 In this special action, petitioner Yvette Tell challenges the respondent judge's refusal to appoint mental health experts to assess Tell's competency to stand trial in the underlying criminal proceedings and her finding that Tell is competent after a justice of the peace previously had found reasonable grounds exist to conduct a full competency examination, pursuant to Rule 11.2(c), Ariz. R. Crim. P. Based on this court's recent decision in *Potter v. Vanderpool*, 592 Ariz. Adv. Rep. 33 (Ct. App. Oct. 5, 2010), and the reasons stated below, we accept jurisdiction and grant relief.

¶2 Tell was charged with shoplifting in April 2009 and with contributing to the delinquency of a minor in September, both in Apache Junction Justice Court. In November, appointed counsel filed a motion for a prescreening evaluation pursuant to Rule 11.2(a), and Justice of the Peace Dennis Lusk appointed Dr. Leo Munoz to evaluate Tell. After Munoz concluded Tell was not competent to stand trial at that time, Judge Lusk transferred the case to superior court for "full Rule 11" evaluations. The respondent judge set the matter for a "review hearing on lower court Rule 11 [proceedings]," and directed "all counsel and defendant to personally appear" at the hearing. After that hearing, the respondent found that Dr. Munoz's "psychological assessment is different from the legal determination of competency." The respondent further found that Tell was competent "to assist counsel in her defense," and returned the case to the justice court "for proper resolution." This special action followed.¹

¹Real party in interest State of Arizona has not filed a response to the petition for special action. Although we may treat a party's failure to respond as a confession of

¶3 We accept jurisdiction of this special action for the same reasons we accepted jurisdiction of the consolidated special actions in *Potter*, 592 Ariz. Adv. Rep. 33, ¶¶ 6-7. The challenged order is interlocutory in nature and Tell has no equally plain, speedy, and adequate remedy by appeal. *Id.* ¶ 7. Additionally, “the issues raised . . . involve questions of law relating to the interpretation and application of procedural rules and are of statewide importance to the judiciary and the litigants who come before it on criminal matters.” *Id.* ¶ 6, quoting *State v. Campoy*, 220 Ariz. 539, ¶ 2, 207 P.3d 792, 795 (App. 2009). As we stated in *Potter*, the error is one of law, which constitutes an abuse of discretion, a ground upon which we may grant special action relief. *Id.*, citing Ariz. R. P. Spec. Actions 3(c). Finally, because this is the third case in which the respondent has ruled in this manner, the error is likely to recur, providing yet another reason for accepting special action jurisdiction.² *Id.* ¶ 7.

¶4 In *Potter*, as here, after prescreening examinations were conducted pursuant to Rule 11.2(c) and A.R.S. § 13-4503(C), and reports were submitted, Judge Lusk found “reasonable grounds exist[ed] for further competency hearings.” 592 Ariz. Adv. Rep. 33, ¶¶ 2, 4, quoting Ariz. R. Crim. P. 11.2(d) (alteration in *Potter*). The *Potter* defendants’ cases were transferred to Pinal County Superior Court in accordance with

error as to any debatable issue, see *Perry v. Ronan*, 225 Ariz. 49, n.1, 234 P.3d 617, 620 n.1 (App. 2010), there is no question here that the respondent judge erred.

²We note that not only is the respondent judge in this case the same respondent as in *Potter*, but the justice of the peace and the expert who conducted the Rule 11.2 prescreening examination are also the same individuals.

Rule 11.2(d). *Id.* ¶¶ 2-4. The respondent judge reviewed Judge Lusk’s decisions, “essentially considered the motions for competency evaluations de novo, and disregarded Judge Lusk’s determinations pursuant to Rule 11.2(d) that reasonable grounds existed to conduct full competency proceedings in both cases.” *Id.* ¶ 14. Based on the plain language of the rule, we concluded that once Judge Lusk had made the reasonable grounds findings and the cases were transferred to superior court, “[i]nstead of replacing Judge Lusk’s decisions with her own, the respondent was required to appoint mental health experts, conduct further proceedings in accordance with the relevant provisions of Rule 11, and then decide whether the petitioners are competent to stand trial.” *Id.*

¶5 For the reasons stated in *Potter*, the respondent judge in this case likewise exceeded her authority and thereby abused her discretion by essentially reviewing Judge Lusk’s decision de novo, and disagreeing with his conclusion. She therefore erred when, at this stage in the proceedings, she made her own findings that Tell was competent and that reasonable grounds did not exist to conduct further Rule 11 proceedings.

¶6 Nor is this case distinguishable from *Potter* on the ground that, in this case, the respondent judge made her decision after a review hearing that Tell had attended. In a footnote in *Potter*, we commented that we did not need to employ principles of construction or “consider the purposes behind, or policy justifications for, the rule to determine its meaning,” because Rule 11’s language is clear and unambiguous. *Id.* n.5. Nevertheless, we noted, “one reason the rule does not provide for superior court review of any other court’s reasonable ground determination is that the determination can be

based on factors other than the prescreen report, including the court's observations of the defendant in the courtroom.” *Id.* But, we were not suggesting that if the superior court were to have the opportunity to observe the defendant, it could then conduct a de novo review of another court's reasonable ground finding. The rule simply does not permit the superior court to second-guess the reasonable grounds finding under Rule 11.2 made by any other court, including a court of limited jurisdiction. Rather, as we made clear in *Potter*, once a court has made the reasonable grounds finding, further proceedings must be conducted in accordance with Rule 11.3.

¶7 Consequently, although it appears the respondent judge made her decision based wholly on her review of Dr. Munoz's report, even if she also considered her observations of Tell at the review hearing, she erred in remanding the case without first conducting those required proceedings. In light of our decision in *Potter* and the clear language of the rule, she was not entitled to conduct a competency review in the first instance; rather, the underlying actions were transferred to her “for appointment of mental health experts” and “further competency hearings.” Ariz. R. Crim. P. 11.2(d). Her own observations may be relevant to her ultimate decision on Tell's competency, but that decision may not be reached until she has acted in compliance with Rule 11.2(d).

¶8 For the reasons stated, we conclude the respondent judge erred when she reviewed Dr. Munoz's reports, essentially considered the motion for competency evaluation de novo, and disregarded Judge Lusk's determination pursuant to Rule 11.2(d) that reasonable grounds existed to conduct full competency proceedings. As in *Potter*,

the respondent judge exceeded her authority and erred as a matter of law, thereby abusing her discretion. Therefore, we grant special action relief and vacate the challenged order. The respondent judge is directed to conduct further proceedings consistent with the relevant provisions of Rule 11 and this decision order.

/s/ *Virginia C. Kelly*
VIRGINIA C. KELLY, Judge

Presiding Judge Vásquez and Judge Eckerstrom concurring.